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No. 02-626

In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is the South Florida Water Management District, a governmental entity of the State of Florida created by Florida Statutes § 373.069(e).

Respondents are the Miccosukee Tribe of Indians of Florida, a federally recognized Indian tribe, and the Friends of the Everglades, Inc., a non-profit Florida corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULES 29.6 AND 14.1 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT	1
A. The South Florida Water Management District And Its Ecosystem	5
B. Early Efforts At Everglades Reclamation	6
C. The U.S. Army Corps Of Engineers' Central & South Florida Project	7
1. Water Conservation Area 3	8
2. Levees L-33 and L-37	9
3. The C-11 Basin	10
4. The C-11 Canal	10
5. The S-9 Pumping Station	11
D. Degradation Of The Natural System	12
E. Comprehensive Everglades Restoration	13
1. The Settlement Agreement	14
2. The Statement of Principles and Florida's Everglades Forever Act	15
3. The Comprehensive Everglades Restoration Plan	16

TABLE OF CONTENTS – Continued

Page

F. Restoration Projects Specific To Waters Managed By The S-9 Pump Station 17

G. Respondents' Suits And The District Court's Decision 18

H. The Eleventh Circuit's Decision 19

SUMMARY OF ARGUMENT 20

ARGUMENT 23

I. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DOES NOT EXTEND TO STATE FLOW DIVERSION FACILITIES THAT DO NOT CONTRIBUTE POLLUTANTS TO THE NATION'S WATERS 23

A. The Plain Language, Structure, And Purposes Of The Clean Water Act Show That NPDES Permits Are Not Required For The Mere Diversion Of Water Through The S-9 Pump Facility 24

B. Legislative History Confirms That The NPDES Program Is Limited To Sources Of Pollutants And Does Not Address Pollution Caused By Water Diversions 32

C. Ordinary Principles Of Statutory Interpretation Establish That The NPDES Program Does Not Apply To Water Diversion Facilities 34

1. A Plain Statement From Congress Is Required To Displace Traditional State Jurisdiction Over State Water Management And Is Lacking Here 34

TABLE OF CONTENTS – Continued

Page

2. The Application Of NPDES To Water Diversion Facilities Would Lead To Absurd And Disastrous Results That Would Thwart Congress's Purposes 37

3. The CWA's Severe Criminal Penalties Require That It Be Narrowly Construed 45

II. A STATE'S DIVERSION OF WATER FROM ONE TO ANOTHER PART OF A SINGLE NAVIGABLE WATER LIKE THE EVERGLADES ECOSYSTEM INVOLVES NO "ADDITION" AND THUS FALLS OUTSIDE THE NPDES SCHEME 46

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Admiral Ins. Co. v. *Feit Mgmt. Co.*, 321 F.3d 1326 (11th Cir. 2003) 27

Appalachian Power Co. v. *Train*, 545 F.2d 1351 (4th Cir. 1976) 27, 42

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992) 25

Association to Protect Hammersley, Eld, & Totten Inlets v. *Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002) 28

BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) 34

Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 32

Catskill Mountains Chapter of Trout Unlimited, Inc. v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) 30

Catskill Mountains Chapter of Trout Unlimited, Inc. v. *City of New York*, 273 F.3d 481 (2d Cir. 2001) 23, 43

Colautti v. *Franklin*, 439 U.S. 379 (1979) 28

Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 26

Crandon v. *United States Boeing Co.*, 494 U.S. 152 (1990) 22, 45

Dubois v. *United States Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 2001) 30

E.I. Du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 31

TABLE OF AUTHORITIES – Continued

Page

EPA v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976) 25, 26

Fishermen v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002) 43

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 21

Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 21

Jones v. *United States*, 529 U.S. 848 (2000) 26

King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 24

Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 2

National Wildlife Fed'n v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) 25, 27, 31, 32

National Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... *passim*

PUD No. 1 v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994) 25, 30, 35

Pronsolino v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002) 3, 36

Rewis v. *United States*, 401 U.S. 808 (1971) 44

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 34

Russell v. *Law Enforcement Assistance Admin.*, 637 F.2d 354 (5th Cir. 1981) 28

Solid Waste Agency of Northern Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 2, 4, 21, 34, 35

United States v. *American Trucking Ass'ns*, 310 U.S. 534 (1940) 38

TABLE OF AUTHORITIES – Continued

Page

United States v. *Bass*, 404 U.S. 336 (1971) 34

United States v. *Granderson*, 511 U.S. 39 (1994).....45

United States v. *Lopez*, 514 U.S. 549 (1995).....35

United States v. *M.C.C. of Fla.*, 772 F.2d 1501 (11th Cir. 1985), vacated, 481 U.S. 1034 (1987) 30

United States v. *Nordic Village*, 503 U.S. 30 (1992) 26

United States v. *Plaza Health Labs.*, 3 F.3d 643 (2d Cir. 1993).....29

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).....27

United States v. *Rutherford*, 442 U.S. 544 (1979).....32

United States v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992).....45

Williams v. *Taylor*, 529 U.S. 420 (2000).....26

STATUTES

33 U.S.C. § 407.....32

33 U.S.C. § 1251.....*passim*

33 U.S.C. § 1288.....3, 36

33 U.S.C. § 1311.....*passim*

33 U.S.C. § 1312..... 2

33 U.S.C. § 1313.....*passim*

33 U.S.C. § 1314.....*passim*

33 U.S.C. § 1316.....31

33 U.S.C. § 1319.....43, 45

33 U.S.C. § 1329.....3, 25, 36

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1342.....*passim*

33 U.S.C. § 1344..... 2

33 U.S.C. § 1362.....*passim*

43 U.S.C. § 982..... 6

Fla. Admin. Code ch. 62-302.....41

Fla. Admin. Code § 62-302.400.....10

Fla. Laws ch. 91-80 14

Fla. Laws ch. 6456 (1913)..... 6

Fla. Laws ch. 25270 (1949)..... 8

Fla. Stat. § 11.80.....16

Fla Stat. ch. 373.....36, 41

Fla. Stat. § 373.016.....5, 13

Fla. Stat. § 373.042..... 5

Fla. Stat. § 373.069..... 5

Fla. Stat. § 373.073..... 5

Fla. Stat. § 373.0831..... 5

Fla. Stat. § 373.403.....9, 10

Fla. Stat. § 373.1501.....8, 13

Fla. Stat. § 373.4592..... 14, 15, 17, 36, 48

Fla. Stat. § 373.4593.....36

Fla. Stat. ch. 403.....41

Fla. Stat. § 403.067(1).....42

Water Resource Development Act of 1996, P.L. 104-303 .....5, 48

TABLE OF AUTHORITIES – Continued

Page

Water Resource Development Act of 2000, P.L. 106-541 48

REGULATIONS

40 C.F.R. Part 30 (2001) 42

40 C.F.R. § 131.10(g)(4) (1992) 30

40 C.F.R. Parts 400-471 31

OTHER AUTHORITIES

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Burns & McDonnell, EVERGLADES PROTECTION PROJECT CONCEPTUAL DESIGN (1994) 15

THE CLEAN WATER ACT HANDBOOK (M. Ryan ed. 2003) 2, 36, 41, 42

Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No. 80-643 (1948) 6, 7, 8, 9, 10

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TABLE OF AUTHORITIES – Continued

Page

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Flood Control Act § 203, 62 Stat. 1176, P.L. 858, 80th Cong., 2d Sess. 8

Florida Executive Order No. 99-144 16

H.R. Rep. No. 92-911 (1971) 21, 33, 34

S. Rep. No. 92-414 (1971), reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972, Ser. No. 93-1 ..... 32, 33, 34

S. Rep. No. 95-370 (1977), reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, Ser. No. 95-14 33

SFWMD Resolution No. 01-22 (2001) 16

SFWMD & DEP, 2003 EVERGLADES CONSOLIDATED REPORT ..... *passim*

Brian J. Skinner & Stephen C. Porter, PHYSICAL GEOLOGY (1987) 38

UNITED STATES CENSUS (2002) 12

U.S. Army Corps of Engineers, C&SF COMPREHENSIVE REVIEW STUDY (1999) ..... *passim*

4 U.S. Army Corps of Engineers, C&SF PROJECT MASTER WATER CONTROL MANUAL (1996) 9, 11, 12

U.S. Department of Interior, et al., Statement of Principles (July 1993) 15

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) 26, 46

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 280 F.3d 1364. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 33a-34a) is unreported. The opinion of the district court (Pet. App. 15a-30a) is unofficially reported at 1999 WL 3349862.

JURISDICTION

The opinion of the court of appeals was entered on February 1, 2002. Pet. App. 1a-14a. The Eleventh Circuit denied petitioner's motion for rehearing and rehearing en banc on June 21, 2002. Pet. App. 33a-34a. On August 29, 2002, Justice Kennedy extended the time for filing the petition for certiorari to and including October 21, 2002. Pet. App. 35a-36a. The petition was filed on that date and was granted on June 27, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Federal Water Pollution Control Act of 1972 ("Clean Water Act" or "CWA") and the Water Resource Development Acts of 1996 and 2000 are reproduced in an addendum to this brief.

STATEMENT

Petitioner South Florida Water Management District ("SFWMD" or "District") operates a comprehensive water management system of levees, canals and flow diversion facilities designed to control and allocate the waters in the Everglades ecosystem for flood control, water supply, and environmental purposes. At issue here is whether the District's pumping of water across a levee requires a National Pollutant Discharge Elimination System ("NPDES") permit under Section 402 of the Clean Water Act (33 U.S.C. § 1342(a)) when the pump diverts water

containing pollutants that do not originate from the District's pumps. The Eleventh Circuit erroneously held that the District requires an NPDES permit for this activity. The Clean Water Act in fact assigns the regulation of such water movements to state non-NPDES programs.

In furtherance of Congress's goal to eliminate "the discharge of pollutants into the navigable waters" (CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1)), the Clean Water Act makes it unlawful to "discharge" "any pollutant" unless [the Environmental Protection Agency ("EPA")], "after opportunity for public hearing," issues an NPDES permit establishing "effluent limitations" for the point source of the pollutant. *Id.* §§ 301(a), 301(b)(1)(A), 302, 402(a), 33 U.S.C. §§ 1311(a), 1311(b)(1)(A), 1312, 1342(a); see *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981). The Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). A "point source," in turn, is "any discernible, confined and discrete conveyance," such as a "pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure." *Id.* § 502(14), 33 U.S.C. § 1362(14). "Navigable waters" are "the waters of the United States, including the territorial seas." *Id.* §§ 502(7), 33 U.S.C. § 1362(7); see *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*"SWANCC"*).

The NPDES permit system is only one of the methods by which Congress envisaged that the Nation's waters would be protected. Beyond the NPDES scheme and the separate permit scheme regulating the discharge of dredged or fill material into the navigable waters (CWA § 404(a), 33 U.S.C. § 1344(a)), Congress left much of the task of preventing water pollution to the States, with federal guidance, assistance, and oversight. See THE CLEAN WATER HANDBOOK 191-220 (M. Ryan ed. 2003). Thus, States are responsible for establishing water quality standards. CWA

§ 303(a), 33 U.S.C. § 1313(a). And States are responsible for achieving those standards, principally by developing programs to manage nonpoint sources of water pollution. CWA §§ 303(d), 319(b), 33 U.S.C. §§ 1313(d), 1329; see *Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002). States pursue these goals through an integrated "continuing planning process" that takes into account local conditions. CWA § 303(e), 33 U.S.C. § 1313(e); see also CWA § 208, 33 U.S.C. § 1288.

Of particular relevance here, Congress drew a distinction between "pollutants" and "pollution." Pollutants—"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste" (CWA § 502(6), 33 U.S.C. § 1362(6))—are the sort of waste materials that might be disposed of in water and that lend themselves to point-source-directed effluent limitations. "Pollution" is more broadly defined as any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 502(19), 33 U.S.C. § 1362(19). Congress understood that the diversion of already polluted water may cause "pollution," but that it does not "add" a "pollutant" to the navigable waters "from" a point source. Accordingly, Congress expressly directed that "pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities"—precisely what is at issue in this case—would be regulated under States' non-point source programs. *Id.* § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F).

Congress took seriously these divisions of responsibility between the federal government and the States, reflecting a concern to maintain States' traditional powers over water

allocation and water and land use. The CWA thus declares that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the [Act]." CWA § 101(g), 33 U.S.C. § 1251(g). And Congress expressly chose "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* § 101(b), § 1251(b). The Clean Water Act, this Court recently observed, must be interpreted with Congress's intent to maintain the federal-state balance of powers firmly in mind. *SWANCC*, 531 U.S. at 166-167, 173.

Prior to the enactment of the CWA, countless flow diversion facilities operated around the Nation, including the pump station at issue here—built by the U.S. Army Corps of Engineers in the 1950s—and other devices critical to flood control and to water supply to urban centers, agriculture, industry, and flora and fauna. Congress nowhere suggested that its new NPDES permit program would regulate those facilities (which generally transferred water chemically different from the receiving water and so resulted in "pollution"). In the 30 years since, as water management features have increased in number with the country's growing population, EPA has not required that such facilities obtain NPDES permits to operate. As numerous public water management *amici* have explained, imposing an NPDES permit requirement now would wreak havoc, mandating costly, time-consuming, and burdensome bureaucratic proceedings to obtain permits, inviting litigation by anyone unhappy with the result, exposing water agencies to huge penalties for past violations, and interfering with the States' highly developed nonpoint source pollution programs—consequences never intended by Congress.

Everglades restoration—currently the subject of enormous effort and public expenditure—would in particular suffer if water diversion facilities became embroiled in the NPDES permit process. Review here will be aided by an understanding of the historical development of water management in the Everglades ecosystem, as well as the State and federal partnership that is now working towards its comprehensive restoration. This background is summarized before turning to the particular facts of this case.

A. The South Florida Water Management District And Its Ecosystem.

The SFWMD is one of five water management districts with stewardship over Florida's public water resources. Fla. Stat. §§ 373.069, 373.016. Supervised generally by Florida's Department of Environmental Protection ("DEP"), the SFWMD establishes and implements the State's water policies from Orlando to Key West. *Id.* §§ 373.069(2)(e), 373.073, 373.016; J.A. Back Pocket.

The Florida legislature has established a goal that "[s]ufficient water be available for all existing and future reasonable-beneficial uses and the natural systems, and that the adverse effects of competition for water supplies be avoided." Fla. Stat. § 373.0831(2)(a). To achieve that goal the District is charged with developing dams, impoundments, reservoirs, and the like; storing water; establishing and maintaining minimum flows and levels for surface and ground waters; preserving natural resources, fish and wildlife; and allocating the state's waters to satisfy all reasonable beneficial uses. *Id.* §§ 373.016, 373.042.

The SFWMD's jurisdiction is drawn along hydrologic boundaries instead of political ones, to provide comprehensive water management for the regional South Florida ecosystem. Fla. Stat. § 373.069(2)(e); Water Resource Development Act of 1996 ("WRDA '96") P.L. 104-303 § 528(a)(4); J.A. 87-88 & Back Pocket. That ecosystem is an

immense, integrated, and unique system of hydrologically connected surface and ground waters extending over 15,000 square miles from central Florida's Butler Chain of Lakes, to the Kissimmee River, Lake Okeechobee, the Everglades, and south to the bays. J.A. 87-88, 170 ¶ 7; Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No. 80-643, at 7 ¶ 2 (1948) ("H.R. Doc. 643"). "The individual drainage basins included in this area constitute, for all practicable purposes, a single watershed" because "their waters intermingle" and "their problems of water control and use, as well as their economic problems, are closely interrelated." *Id.* at 15 ¶ 4.

B. Early Efforts At Everglades Reclamation.

The Everglades in its natural state was a vast "grassy water" averaging forty miles across and encompassing some three million acres. H.R. Doc. 643 at 17. This immense wetland was supplied by overflow from Lake Okeechobee, seeping ground water, and localized rainfall, which flowed slowly southward over South Florida's flat landscape to the sea. *Id.* at 7, 16. The Everglades water table rose and fell, above and below the ground, its virtually indistinguishable surface and ground waters forming a single water system. J.A. 110-111, 117.

In 1850 the United States granted to the States "swamp lands and overflowed lands that were unfit for cultivation for the express purpose of constructing levees and drains to reclaim them." Swamp Lands Act, 43 U.S.C. § 982. More than 2.8 million acres of Everglades were subsequently transferred to Florida. H.R. Doc. 643 at 8. After failed private efforts at reclamation, a Drainage District was established in 1913. Laws of Florida ch. 6456 (1913). In following years, hundreds of miles of drainage canals were dug. EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 55 (S. Davis & J. Ogden eds., 1994); J.A. Back Pocket; H.R. Doc. 643 at 8. As these efforts reclaimed land from the Everglades, farming flourished, benefiting from fertile

organic "muck" soils and subtropical weather. Southeast Florida's population soared from 17,510 in 1910 to 214,830 by 1930. H.R. Doc. 643 at 5, 18-19.

These developments "altered the natural balance between water and soil." H.R. Doc. 643 at 32. As flammable muck soils were drained and dried out, thousands of acres were destroyed by fires. And "because of oxidation and decomposition when dry, the deep muck and peat soils * * * subsided from 3 to 6 feet" as the result of over-drainage. Lowering the water table also lessened lateral pressure against the ocean, allowing salt water to intrude and destroy coastal well fields and lands. "Between 1910 and 1942, the rate of salt-water encroachment in the aquifer was 235 feet a year in the Miami area." Numerous wells along the east coast had to be repeatedly moved. *Id.* at 30-36.

Disastrously, existing canals also proved incapable of controlling flooding. Over 2,500 people lost their lives in 1926 and 1927 hurricanes, and further catastrophic flooding occurred in 1947 and 1948. H.R. Doc. 643 at 9, 23-24, 26. "When the rains finally ceased [in 1947], ninety percent of southeastern Florida, from Orlando to the Keys, was underwater." U.S. Army Corps of Engineers, C&SF COMPREHENSIVE REVIEW STUDY 1-25 (1999) ("RESTUDY").

C. The U.S. Army Corps Of Engineers' Central & South Florida Project.

In 1939, Florida's Soil Science Society advocated new concepts for water management, decrying damage caused by reckless drainage, urging comprehensive water resource development, and calling for the reversion of large areas to wetlands by "re-watering." De Grove, CENTRAL AND SOUTH FLORIDA FLOOD CONTROL PROJECT 100-101 (1958). Congress adopted many features of the State's re-watering plan in 1948 when it established the Central and Southern Florida Project for Flood Control and Other Purposes ("C&SF Project"), administered by the U.S. Army Corps of

Engineers ("Corps"). Flood Control Act § 203, 62 Stat. 1176, P.L. 858, 80th Cong., 2d Sess. Florida's new Central & Southern Florida Flood Control District acted as the local sponsor for the Project. Fla. Laws ch. 25270 (1949).

The C&SF Project was a "comprehensive plan of improvement designed to remove excess water from urban, pasture, and farm lands, to conserve water for control of ground-water levels during dry periods, and to prevent overflow of the coastal areas by water from the Everglades." H.R. Doc. 643 at 9 ¶ 7. Four principal technologies were adopted to achieve these goals: levees, water storage areas, channel improvements, and pumps. Davis & Ogden, *supra*, at 60. The C&SF Project has developed into a complex water control system comprising over 2000 miles of levees and canals, approximately 1350 square miles of Water Conservation Areas (WCAs), and over 160 major water diversion structures, through which the SFWMD (which has succeeded the C&SF District as local sponsor) allocates the State's waters. RESTUDY at 1-10, 1-15; Fla. Stat. § 373.1501.

This case involves several C&SF Project components, which are delineated on the map reproduced in the back cover pocket of the Joint Appendix. The S-9 Pump Station, which the court of appeals held requires an NPDES permit, moves water from the C-11 Basin and Canal in developed western Broward County about 60 feet across the L-33 and L-37 Levees into Water Conservation Area 3—features we now describe.

1. Water Conservation Area 3.

The C&SF Project "created three interconnected reservoir areas." H.R. Doc. 643 at 42 ¶ 59(a). These huge impoundments are Water Conservation Areas 1, 2, and 3 (WCAs), which align with Everglades National Park and the historic southward flow of the Everglades. RESTUDY at 1-15 to 1-17; J.A. Back Pocket. The WCAs are bounded by levees which allow water to be maintained within them at higher levels

than in the surrounding areas. Maintenance of water in the WCAs raises the ground-water table, improves water supply for urban and agricultural uses, ameliorates salt-water intrusion in east-coast well fields and streams, and benefits fish and wildlife in the Everglades. H.R. Doc. 643 at 42-43 ¶ 59(a).

WCA-3 encompasses 915 square miles in western Broward and Dade counties. SFWMD & DEP, 2003 EVERGLADES CONSOLIDATED REPORT 1-2 ("CONSOLIDATED REPORT"). It contains undeveloped land, predominantly sawgrass marsh dotted with tree islands, wet prairies and aquatic sloughs. *Ibid.* The WCA-3 is managed by 11 levees, 19 gated spillways and culverts, and 3 pump stations. 4 U.S. Army Corps of Engineers, C&SF PROJECT MASTER WATER CONTROL MANUAL 2-6 to 2-11 ("CORPS MANUAL"). Water stored in WCA-3 is needed not only for urban and agricultural users, but for the long run restoration of the Everglades. J.A. 65-66; CONSOLIDATED REPORT at 1-1.

2. Levees L-33 and L-37.

Along Florida's lower east coast lies a sandy ridge, 5 to 10 miles wide, which formed the eastern border of the historic Everglades. H.R. Doc. 643 at 18. The C&SF Project constructed levees parallel to this coastal ridge, reclaiming the portion of the Everglades between the levees and the ridge. *Id.* at 42-43. These levees are a dual functioning dam,[1] providing for storage of water in the WCAs to the west while protecting the east coast from flooding. *Id.* at 42-43 ¶ 59(a)(1). The L-33 and L-37 levees separate WCA-3 from the C-11 Basin. J.A. Back Pocket. Before they were constructed the waters of the WCA-3 and C-11 Basin

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[1] A "'dam' means any artificial or natural barrier, with appurtenant works" that "obstruct[s] or impound[s] * * * any of the surface waters of the state." Fla. Stat. § 373.403(1).

intermingled and flowed together in a southerly direction as a single water body. Pet. App. 3a n.2, 8a n.8.

3. The C-11 Basin.

A drainage basin is a subdivision of a watershed, created to compartmentalize waters for management purposes. Fla. Stat. § 373.403(9); J.A. 67-68. The structures of the C&SF Project create numerous basins that for all practical purposes are a single, hydrologically connected watershed. H.R. Doc. 643 at 15; J.A. 67-68, 87-88. Basin lines are dynamic, being drawn and re-drawn to accommodate changes in water management regimes. See J.A. 108-109.

The C-11 Basin encompasses 104 square miles of western Broward County adjoining the WCA-3 and is divided into West and East sub-basins. J.A. 107, 110, 184-85. Before reclamation the C-11 Basin was part of the Everglades, remaining covered with surface waters year round and seldom drying out. J.A. 114, 172 ¶ 15. Today it is urban and agricultural in character, with significant residential areas. J.A. 172 ¶ 18. Its waters are highly controlled by C&SF Project canals, spillways, gates, and pumps along with water management systems operated by local drainage districts and residential developments.

4. The C-11 Canal.

The C&SF Project includes over 1000 miles of canals. RESTUDY at 1-10. The C-11 Canal runs east-west from the Miami canal in WCA-3 to tide waters in the east. J.A. 170-171 ¶¶ 5 & 10. It provides flood protection for the C-11 Basin, drainage for development, regulation of groundwater to prevent salt water intrusion, and allocation of water for irrigation and to recharge municipal well fields. J.A. 109. The C-11 Canal and WCA-3 are navigable Class III surface waters for recreation and propagation and maintenance of a healthy, balanced population of fish and wildlife. Fla. Admin. Code. § 62-302.400.

5. The S-9 Pumping Station.

C&SF Project pumping stations move and allocate water throughout the system. The S-9 pump station—which is the subject of this litigation—is one of three used to provide the WCA-3 with water for beneficial uses or for release to Everglades National Park. RESTUDY App. L, Sec. L-44; J.A. 65-66; CONSOLIDATED REPORT at 1-1. The S-9 pump is located at the intersection of the C-11 Canal and the L-33 and L-37 levees. J.A. Back Pocket. It moves water from the C-11 Canal about 60 feet across the levees into the WCA-3. J.A. 172 ¶ 14. The S-9 begins pumping when water in the C-11 Canal reaches four feet above sea level and stops pumping when it falls to one foot above sea level. 4 CORPS MANUAL at 7-5; J.A. 71-72.

The water in the C-11 Canal comes from a variety of sources. Because the water level in the WCA-3 is generally maintained much higher than water in the C-11 Basin, and because the underlying aquifer is uncontained, water continually seeps from WCA-3 into the C-11 Basin and is pumped back in cycles. J.A. 26, 37. Absent the S-9 pump, the C-11 Basin could flood within days from seepage alone. J.A. 172 ¶ 17; Pet App. 9a n.9. Water also reaches the C-11 Canal from upstream agricultural and urban runoff.

The water in the C-11 Canal that is pumped by the S-9 may contain pollution originating from upstream agricultural, residential, and other land uses. J.A. 116, 127, 133. No pollutants, however, are introduced from the S-9 pump to the water it conveys. Pet. App. 3a. The pump disposes of no waste or anything else, having the singular purpose of moving water as part of the State's areawide management of the Southern Florida ecosystem.

* * *

These components of the C&SF Project are operated by the District in accord with the CORPS MANUAL. The Corps and SFWMD work closely together as water levels and flows

are constantly adjusted to balance competing interests throughout the system. 4 CORPS MANUAL at 1-1. Through experience and scientific discovery, optimum seasonal water levels have been established in the Corps Manual for each canal and basin.

D. Degradation Of The Natural System.

Today, over five million people live along Florida's lower east coast, all of whom depend upon the C&SF Project to protect their homes and businesses from flooding and provide a stable water supply. In the C-11 West Basin alone, 136,000 people depend upon the S-9 pump to prevent flooding. 2000 CENSUS. The C&SF Project's remarkable success reclaiming land is undeniable.

Still, it is now understood that the C&SF Project has caused unintended degradation of the environment. Over the years, "[t]he Everglades have been reduced in area by half" and what remains "is in a continuing state of decline largely as a result of altered water regimes." RESTUDY at 3-1. As the Corps concluded (*ibid.*), the situation today

> can be attributed largely to a diminished capacity to retain the huge volume of water that once pooled and sheet flowed across the pre-drainage landscape. These waters are now either discharged in massive volumes through canal systems to tide or are stored at unnaturally high levels in [the WCA's]. In hindsight, many of these problems are now recognized to be unanticipated effects of the existing [C&SF Project]. They are exacerbated by the inescapable reality that people continue to move to south Florida at one of the highest rates in the nation. The result is a currently non-sustainable system of urban, agricultural and natural environments in south Florida that exceeds the capacity of, or is hampered by, the existing system of water management.

Water quality has been degraded as well. Urban and agricultural development has introduced pollutants into the ecosystem at rates that cannot be assimilated. The resulting imbalance of the ecosystem is manifest in declined faunal populations and an increase in invasive flora. See CONSOLIDATED REPORT at 1-8.

In view of these problems, SFWMD has worked closely with local, State and federal authorities to arrive at a solution to restore and preserve the Everglades while also addressing the complex water management issues that are so important in this region.

E. Comprehensive Everglades Restoration.

In 1972, when the SFWMD became local sponsor of the C&SF Project, its mission was expanded to include environmental protection and restoration in addition to water supply and flood control. Fla. Stat. §§ 373.016, 373.1501. The same year, Congress passed the Clean Water Act, creating federal and state programs aimed at restoring the integrity of the Nation's waters, including the development of state water quality standards. 33 U.S.C. § 1251 *et seq.*

Thirty years later, the South Florida ecosystem is in the midst of the largest, most comprehensive environmental restoration effort in history, including an unprecedented State and federal partnership at a projected shared cost of over $8 billion. See generally RESTUDY. Today's comprehensive restoration plans are still emerging from three decades of intense wrangling among competing interests coincident with the development of sufficient scientific knowledge to modify the C&SF Project in a way that can satisfy urban, agricultural and environmental needs.

The comprehensive restoration effort is being driven by an extraordinary array of agencies, coordinating groups and committees overseeing three initiatives: the Settlement Agreement, Florida's Everglades Forever Act, and the Corps' Restudy.

1. The Settlement Agreement.

In 1988, the United States sued Florida alleging that contamination caused by nutrient runoff into Everglades National Park and Loxahatchee National Wildlife Refuge (WCA-1) violated *State* pollution laws. *United States* v. *South Florida Water Management District*, No. 88-1886 (S.D. Fla.). Intervenors included respondent Tribe, environmental groups, cities, and agricultural interests. *Ibid.*

In 1991 Florida enacted the Everglades Protection Act, which authorized the District to establish strategies to bring its facilities into compliance with water quality standards, restore the flow of waters in the Everglades, conduct research programs, recommend discharge limitations, and engage in monitoring. Fla. Laws ch. 91-80; Fla. Stat. § 373.4592 (1991). These programs were to be part of SFWMD's comprehensive Everglades Surface Water Improvement and Management Plan ("SWIM"). *Ibid.* The Act also established the Everglades Protection Area (comprising all three WCAs and Everglades National Park) and a State stormwater permitting program for SFWMD structures discharging into that Area, including the S-9 pump. Fla. Stat. § 373.4592(2)(g); J.A. 181-183.

These programs far exceeded the relief sought in the USA lawsuit. In 1992, the court accepted a Settlement Agreement in that case which tracked the programs of the Everglades Protection Act. 847 F. Supp. 1567, 1570 (S.D. Fla. 1992). The settlement established an "ambitious strategy to restore and preserve the Everglades ecosystem." *Id.* at 1569. It remains monitored by the district court and overseen by a Technical Oversight Committee that plans, reviews, and recommends research, monitoring, and compliance. *Ibid.*; see also http://www.sfwmd.gov/org/ema/toc/about.html.

Florida moved expeditiously to comply with its obligations under the Everglades Protection Act and Settlement Agreement. In 1992, the SFWMD approved a

comprehensive Everglades SWIM plan while Florida's Department of Environmental Protection gave notice of intent to issue a permit for facilities discharging into the WCAs and developed a Best Management Practices Rule designed to reduce phosphorus discharges.

2. The Statement of Principles and Florida's Everglades Forever Act.

These efforts were confounded by an onslaught of litigation. The parties to these suits entered into mediation that culminated in 1993 with a Statement of Principles establishing several principles that have guided restoration ever since. These principles include Florida's commitment to increase water quantity to the Everglades, implement a detailed plan with specific construction schedules, and reduce phosphorus through Best Management Practices. Fla. Stat. § 373.4592(1)(c); Statement of Principles (July 1993).

The Statement of Principles became the basis for Florida's Everglades Forever Act ("EFA"), which established a partnership between Florida's DEP and SFWMD to develop and implement comprehensive, innovative solutions to Everglades restoration. Fla. Stat. § 373.4592(1)(e); see CONSOLIDATED REPORT at 1-6, http://www.sfwmd.gov/org/ema/everglades/index.html. The EFA's restoration program includes the Everglades Construction Project,[2] hydropattern restoration projects, research and monitoring, strict

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[2] The Everglades Construction Project, aimed at improving deliveries of water to the remaining Everglades, comprises six Stormwater Treatment Areas treating runoff from 769,000 acres, together with a modified drainage system for the Everglades Agricultural Area. Burns & McDonnell, EVERGLADES PROTECTION PROJECT CONCEPTUAL DESIGN ES-2 (1994); see http://www.sfwmd.gov/org/erd/ecp/3_ecp.html. It is the largest environmental restoration program of its type ever undertaken. Fla. Stat. § 373.4592(h).

regulatory programs, and exotic species control. CONSOLIDATED REPORT at 1-7.

Implementation of the Everglades Forever Act is monitored by a Joint Committee of the Florida legislature. Fla. Stat. § 11.80. Oversight is also provided by State advisory groups such as the Governor's Commission for the Everglades. Fla. Executive Order No. 99-144. The SFWMD has in addition established a Water Resources Advisory Commission comprised of governmental, tribal, business, agricultural, environmental, and public interest representatives to provide stakeholder input and recommendations regarding activities needed to restore the greater South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. SFWMD Resolution No. 01-22 (2001); http://www.sfwmd.gov/gover/wrac/ref_mat/priorityplan.pdf; http://www.sfwmd. gov/gover/wrac/members.html.[3]

3. The Comprehensive Everglades Restoration Plan.

In 1996, Congress directed the Corps, in cooperation with the District, to develop a comprehensive Everglades restoration plan. WRDA '96 § 528(b). To consult regarding development of this plan, Congress established the South Florida Ecosystem Restoration Task Force ("Task Force"), comprised of representatives from seven federal agencies, the Miccosukee and another tribe, and five state, regional, and local governments. WRDA '96 § 528(f); see http://www.

[3] Governance and planning within the SFWMD involve a myriad of federal, state, regional, and local agencies. This includes 16 county governments, 122 municipalities, two tribal governments, numerous special districts, six metropolitan planning organizations, five regional planning councils (South Florida, Southwest Florida, Treasure Coast, Central Florida, and East Central Florida), the SFWMD, five major state environmental planning and regulatory agencies, and 11 federal agency managers.

sfrestore.org. A multi-agency, multi-disciplinary team, including biologists, ecologists, economists, engineers, hydrologists, planners, public investment specialists, and real estate specialists participated in the project. RESTUDY at vi.

The Restudy, completed in 1999, recommended the $8 billion Comprehensive Everglades Restoration Plan ("CERP"). http://www.evergladesplan.org/pub/restudy_eis.cfm#mainreport. CERP calls for numerous structural and operational changes to the C&SF Project in order to restore the quantity, quality, timing, and distribution of water. CONSOLIDATED REPORT at 7A-3; http://www.evergladesplan.org/about/rest_plan_03.cfm. Implementation of CERP is overseen by a broad array of organizations, including the Task Force. See http://www.sfrestore.org. The Corps and SFWMD also jointly sponsor an interagency, interdisciplinary team to apply scientific and technical information in support of the objectives of CERP. See http://www.evergladesplan.org/pm/recover/recover.cfm.

F. Restoration Projects Specific To Waters Managed By The S-9 Pump Station.

The Everglades Forever Act and CERP include several projects to improve the quality of water in the C-11 Basin pumped by S-9 to WCA-3.

State Permits. Because the S-9 pump discharges into the Everglades Protection Area it has been permitted by the State under the Everglades Forever Act. Fla. Stat. § 373.4592(9)(k) & (*l*); J.A. 179 ¶¶ 4, 5. The S-9 permit requires development of strategies to ensure that the facility meets all State water quality standards, including those for phosphorus, by the end of 2006. *Ibid.*; Fla. Stat. § 373.4592(10); see CONSOLIDATED REPORT at 8B-1 to 8B-20.

C-11 West Critical Project. A divide structure in the C-11 Canal is intended to isolate seepage entering from the WCA-3. A set of smaller pumps, S-9a, have been placed next to S-9 to return seepage to WCA-3 before it mixes with more

polluted runoff from the C-11 Basin. It is anticipated that phosphorus levels going into WCA-3 will be reduced by pumping seepage water and decreasing operation of the larger S-9 pumps. Burns & McDonnell, EVERGLADES PROTECTION AREA TRIBUTARY BASINS CONCEPTUAL PLAN 3-21 to 3-24 (2003) ("CONCEPTUAL PLAN").

Western C-11 Impoundment and Diversion Canal. A CERP project, scheduled for completion by January 2006 at a cost of $125 million, consists of a 1600 acre impoundment and stormwater treatment area within the C-11 Basin and eight miles of canal to divert flood waters to other storage areas. By storing more water in the C-11 Basin, this project will reduce the amount of pollutants entering WCA-3. *Ibid.*

North Lake Belt Storage. The North Lake Belt Storage is another CERP project designed for the dual purposes of storing water for water supply and diverting stormwater flows from being pumped by S-9 into the WCA-3. It is scheduled for completion in 2036. *Ibid.*

* * *

These comprehensive efforts are intended to resolve water quality problems. Both State and federal programs are designed to ensure that waters within and leaving the C-11 Basin fully comply with water quality standards. Neither EPA nor any of the governments' other agencies, committees or other groups involved in these efforts have ever suggested that NPDES should supplement or would contribute anything positive to existing comprehensive restoration efforts.

G. Respondents' Suits And The District Court's Decision.

Dissatisfied with the comprehensive Everglades restoration planning process, the Miccosukee Tribe of Indians and Friends of the Everglades, Inc., filed Clean Water Act citizen suits challenging operation of the S-9 pump station without an NPDES permit. Plaintiffs contended that the diversion of water in the C-11 Basin through the S-9

pump into the WCA-3 is a "discharge" requiring an NPDES permit because the pumped water contains more phosphorus than the receiving water. The parties filed cross motions for summary judgment on the legal question whether pumping water through the S-9 pump station constitutes the "addition" of pollutants to navigable waters "from" a point source for which a NPDES permit is required.

The district court granted summary judgment to plaintiffs (Pet. App. 15a), holding that "it was not necessary for a conveyance to be the originator of the transferred contaminants" for there to be an "addition." Pet. App. 29a. The district court enjoined the transfer of water through the S-9 pump station without a NPDES permit. Pet. App. 31a-32a. The parties stipulated to a stay pending appeal because pumping is necessary to prevent catastrophic flooding of several municipalities in western Broward County. Pet. App. 12a n.12.

H. The Eleventh Circuit's Decision.

The Eleventh Circuit reversed the injunction, finding that the lower court did not adequately consider the public interest. It affirmed the district court's judgment that the S-9 required a NPDES permit. Pet. App. 14a.

The court rejected in a footnote SFWMD's contention that NPDES applies only to point sources from which pollutants originate. Pet. App. 7a. n.6. It rejected the District's argument that a point source operator is not responsible for pre-existing pollution in the navigable waters, whether naturally occurring or introduced from other sources.

The Eleventh Circuit conceded that "[t]he S-9 pump station * * * adds no pollutants to the water which it conveys." Pet. App. 3a. The court declared, however, that an "addition" "from" a point source occurs any time the point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have

otherwise flowed, asking whether the pollutant would have reached the water body "but for" the operation of the point source. Pet. App. 7a-9a.

SUMMARY OF ARGUMENT

I. The Eleventh Circuit's ruling that the SFWMD requires an NPDES permit to move water within its system whenever the diverted water is chemically different from the receiving water is contrary to the plain language, structure, and purposes of the Clean Water Act.

The plain import of Congress's carefully chosen words limiting the scope of the NPDES permit program—a permit is required only for the "addition" of a "pollutant" "from" a "point source"—is that it applies only when a pollutant originates from the point source, not when pollutants originating elsewhere merely pass through a flow diversion facility. The movement of water containing pollution that originated elsewhere is heavily regulated by the States under nonpoint source pollution prevention programs, which Congress approved in the CWA and which operate in a manner entirely different from the NPDES permit program.

Congress drew a clear distinction between federal permitting of the addition of "pollutants"—end of pipe discharges of industrial and municipal waste amenable to effective regulation by technology-based effluent limitations imposed in NPDES permits—and state nonpoint source regulation of "pollution," which is "the man-made or man-induced alteration of chemical, physical, biological, and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). That diverting the flow of water containing pollutants originating elsewhere falls into the latter category is confirmed by Section 304(f)(2)(F), in which Congress specifically provided that any "pollution" resulting from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or

flow diversion facilities," is nonpoint source pollution regulated by the States, not through the federal NPDES program. 33 U.S.C. § 1314(f)(2)(F); see H.R. Rep. No. 92-911 at 109 (1971) (Section 304(f) is an integral part of the effort to "control * * * pollution from such nonpoint sources as * * * natural and manmade changes in the normal flow of surface and groundwaters").

Any doubt that the NPDES program does not extend to the States' diversion of their waters is settled by three principles of statutory construction.

First, a clear congressional statement is required to alter the traditional federal-state balance of powers. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 166-167, 173 (2001). There is no clear statement in the CWA that Congress intended to subject traditional state control of water management and movements to federal permitting. To the contrary, Congress declared its intent to preserve the rights of the States to plan, develop and allocate their water resources. CWA § 101(b), (g), 33 U.S.C. § 1251(b), (g). The federal and state governments were given distinct roles under the CWA which should be upheld.

Second, the Eleventh Circuit's radical extension of NPDES and its substantial regulatory burdens to hundreds of thousands of state and local water control facilities around the country would have enormous and quite absurd consequences plainly not contemplated by Congress. These include the imposition of NPDES requirements on flow diversion facilities that are inconsistent with and undermine state nonpoint source pollution regulation, potentially huge penalties against public water management agencies for past and continuing violations of Section 402, potential criminal prosecution, and an exponential increase in the workload of permitting agencies far beyond their capacity to handle. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575

(1982). Particularly in light of these consequences, had Congress imagined that Section 402 reached commonplace and essential movements of water it would certainly have said so. It did not. Instead it specifically assigned regulation of pollution from changes in water movements, circulation, or flow diversion to state nonpoint source programs in Section 304(f)(2)(F).

Finally, under the "rule of lenity," the reach of Section 402 must be construed narrowly in light of the serious criminal penalties the Act imposes for violations. *Crandon* v. *United States Boeing Co.*, 494 U.S. 152, 168 (1990).

II. The Eleventh Circuit erred for a second reason. It properly recognized that, as a matter of plain meaning, moving water around within a single body of navigable water can never amount to an "addition" to the water body. The court concluded, however, that the historic Everglades—which the court appeared to concede was a single body of navigable water—had been subdivided by the C&SF Project facilities into separate and distinct water bodies, and that moving polluted water from the C-11 Basin and Canal to the CWA-3 impoundment constituted an "addition." That was error. As the United States told this Court in its brief filed at the certiorari stage (at 13), the "C-11 Canal and the WCA-3A can appropriately be viewed * * * as parts of a single body of water."

The unitary nature of the waters in the Everglades ecosystem, including those on either side of the S-9 pump station, is well established both scientifically and as a matter of law. The current basins, as the United States observed (at 13), "share a unique, intimately related hydrological association." An objective of CERP is to achieve even "greater system connectivity" and "sheetflow." RESTUDY at vii. Furthermore, the components of the C&SF Project "were created and are managed pursuant to legislative direction—by both the United States and the State of Florida—as part of a single integrated resource." U.S. Brief at 13-14. Moving

water around this system cannot constitute an "addition" and therefore does not require an NPDES permit.

ARGUMENT

I. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DOES NOT EXTEND TO STATE FLOW DIVERSION FACILITIES THAT DO NOT CONTRIBUTE POLLUTANTS TO THE NATION'S WATERS.

The Clean Water Act gave the Environmental Protection Agency authority under the National Pollutant Discharge Elimination Program to regulate the "discharge of pollutants into the navigable waters." CWA §§ 101(a)(1), 402, 404. For over 30 years EPA has required that permits be obtained by industrial, municipal and other dischargers of waste—and not by the hundreds of thousands of flow diversion facilities used by federal, state, and local governments to manage and allocate their waters. Nonetheless, according to the Eleventh Circuit a "discharge of pollutants" occurs whenever water is diverted between basins and the diverted water contains more or different pollutants than the receiving water—an activity routinely engaged in by public water managers throughout the country as they seek to fulfill the complex and often competing needs of flood control, preservation and enhancement of the environment, recreation, and water supply to residential, agricultural, and industrial users.

So expansive an interpretation of the NPDES program would have disastrous consequences, putting countless water control structures around the country—structures vital to the States' role as stewards of the Nation's waters—out of compliance with the CWA and requiring that they be permitted. That would expose water management agencies to huge penalties for past violations, like the $5.7 million penalty recently levied against New York City in *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), and even to

criminal prosecution. It would divert scarce government resources to permitting and interfere with the States' nonpoint source pollution programs. It would overwhelm already stretched permitting authorities with an enormous new category of work. And it would spawn a whole new area of wasteful litigation over the propriety of permits or permit terms.

None of this was contemplated by Congress when it adopted the CWA. The text, structure, purposes, and legislative history of the Act are clear and unambiguous. They show that Congress intended that pollution caused by changes in the movement of water would be regulated under state nonpoint source programs, not the NPDES.

A. The Plain Language, Structure, And Purposes Of The Clean Water Act Show That NPDES Permits Are Not Required For The Mere Diversion Of Water Through The S-9 Pump Facility.

The terms used in the Clean Water Act do not extend the NPDES program to regulate flow diversion facilities like the S-9 pump station that convey water without disposing of any pollutants. Because the meaning of statutory language depends on context, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), we briefly outline the NPDES program before turning to more specific terms of the statute.

1. The CWA divides the causes and control of water pollution into two categories: (1) "point sources of pollutants" and (2) "nonpoint sources of pollution." *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165-166 (D.C. Cir. 1982). Point sources of pollutants—substances listed in CWA § 502(6), 33 U.S.C. § 1362(6) that are introduced "from" a point source—are regulated under the NPDES permit scheme established in Section § 402. Nonpoint sources of pollution—which are "defined by exclusion" and encompass "all water quality problems not subject to" point source regulation (*Gorsuch*, 693 F.2d at 166)—are regulated

under state water quality programs. CWA §§ 402, 303, 319, 33 U.S.C. §§ 1342, 1313, 1329; see *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988) ("State water quality standards are the basis of the 'nonpoint source' program"). These regulatory programs define distinct federal and state roles, satisfy different purposes, and use different strategies to achieve their goals. See *Arkansas* v. *Oklahoma,* 503 U.S. 91, 101 (1992); *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

The NPDES program was born of "the national goal that the discharge of pollutants into the navigable waters be eliminated." § 101(a)(1), 33 U.S.C. § 1251(a)(1). The CWA "aimed at achieving maximum 'effluent limitations' on 'point sources.'" *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204-205 (1976). It is unlawful for any person to "discharge a pollutant" without obtaining an NPDES permit and complying with its terms. *Ibid.* The NPDES permit serves to transform "generally applicable effluent limitations" into "obligations * * * of the individual discharger." *Ibid.*

"Effluent limitations" restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, * * * including schedules of compliance." 33 U.S.C. § 1362(11). As this Court has observed,

> [s]uch direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.

EPA, 426 U.S. at 204-205. Effluent limitations are established and enforced applying the "best available technology economically achievable." § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

As we explain below, Congress plainly did not intend that this scheme requiring that point source pollutants be removed to the greatest economically feasible extent prior to discharge should apply to a State's diversions of its waters.

2. The starting point for interpretation is the language of the statute itself. *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Congress defined the "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." § 502(12), 33 U.S.C. § 1362(12). These terms—"addition," "pollutant," "from" and "point source"—are words of limitation, each of which must be given "operative effect." *United States* v. *Nordic Village*, 503 U.S. 30, 36 (1992). A court may not adopt an interpretation that gives this "limiting language * * * no office." *Jones* v. *United States*, 529 U.S. 848, 857 (2000).

Dictionary definitions provide guidance to the meaning of the statute. *Williams* v. *Taylor*, 529 U.S. 420, 431-432 (2000). An "addition" is "the result of adding; anything added; increase, augmentation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971). "From" is commonly "used as a function word to indicate * * * the starting point; as a point or place where an actual physical movement * * * has its beginning * * * [or] the starting or focal point of any activity or movement, * * * [and] the place of origin, source or derivation of a material or immaterial thing." *Ibid.* "Source" means "the point of origin of a stream of water" and "origin." *Ibid.*

Read together, the terms "addition," "from" and "point *source*" most naturally mean that a "discharge" occurs when the pollutant originates from the point source, not when

pollutants originating elsewhere are merely passed through. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-133 (1985) ("Congress recognized" in the CWA that to achieve its goals "it is essential that discharge of pollutants be controlled *at the source*") (emphasis added) (quoting S. Rep. No. 92-414, at 77 (1971)); *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass"); *Admiral Ins. Co.* v. *Feit Mgmt. Co.*, 321 F.3d 1326, 1329 (11th Cir. 2003) (the "ordinary and plain meaning" of "from" is "originating in" or "produced by," not "through" or "by way of"). The S-9 pump station is not the "starting point," "source," or "origin" of any pollutants. Any pollutants are added to the navigable waters of the C-11 Canal from other "sources" within the surrounding area or already exist in the environment. Pet. App. 3a. The District's operations do not increase or augment the amount of pollutants in the navigable waters. *Ibid.*

Reading this statutory language in *Gorsuch*, Judge Wald concluded in her opinion for the D.C. Circuit that "it does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source.' Instead, * * * the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source." 693 F.2d at 176. Such an "addition" "occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175; see also *Consumers Power*, 862 F.2d at 586 (same).

3. This plain reading of the statute draws support from Congress's choice, when defining the scope of the NPDES program in Section 402, to use the term "pollutants" rather than "pollution." "Pollution" is "the man-made or man-induced alteration of chemical, physical, biological, and

radiological integrity of water" (CWA § 502(19), 33 U.S.C. § 1362(19)), a broad definition that might well encompass the diversion of water in this case. "Pollutant," much more narrowly defined, "means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, celler dirt and industrial, municipal, and agricultural waste discharged into water." CWA § 502(6); see *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979) (a definition declaring what a term "means" excludes any meaning not stated). This more restrictive definition tailors the NPDES program to its goal of eliminating the disposal of physical substances or "waste" that typically discharge from industrial and municipal activities. See *Gorsuch*, 693 F.2d at 175 ("Throughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes"); *Association to Protect Hammersley, Eld, & Totten Inlets* v. *Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (pollutants are "waste material of a human or industrial process"). The movement of water through the S-9 does not dispose of anything into the waters. Pet. App. 2a-3a.

Under these definitions, a "pollutant" once discharged to the navigable waters becomes "pollution." Had Congress required an NPDES permit for "*pollution* by a point source," it might more nearly have captured the diversion of polluted water into more pristine water. But Congress required a permit only for the discharge of a pollutant, which is not involved in such a diversion. The use of the two different terms is presumed to be intentional, see *Russell* v. *Law Enforcement Assistance Admin.*, 637 F.2d 354, 356 (5th Cir. 1981), especially when the legislation specifically defines both terms. *Gorsuch*, 693 F.2d at 172.

The term "point source" is also telling. A "point source means any discernible, confined and discrete conveyance, * * * from which pollutants are or may be discharged." CWA

§ 502(14), 33 U.S.C. § 1362(14). That definition evokes "images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States* v. *Plaza Health Labs.*, 3 F.3d 643, 646 (2d Cir. 1993) (describing CWA's emphasis upon industrial and municipal wastes). That focus makes sense, for "[i]ndustrial and municipal point sources were the worst and most obvious offenders of surface water quality" and "the easiest to address because their loadings emerge from a discrete point such as the end of a pipe." *Ibid.*, quoting David Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 NAT. RESOURCES J. 219, 221 (1992). The District's movement of polluted water, not to dispose of pollutants but to achieve public goals of flood control, water supply, protection of aquifers from salt water incursions, recreation, and environmental protection, bears not the least resemblance to the point source waste disposal that was Congress's principal target in Section 402 of the Act.

4. The Eleventh Circuit's conclusion that an addition occurs whenever a "point source changes the natural flow of a water body" (Pet. App. 7a-8a) also cannot be squared with § 304(f) of the CWA, 33 U.S.C. § 1314(f), which provides:

> **(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.** The [EPA] Administrator, after consultation with appropriate Federal and State agencies * * *, shall issue * * * (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from— * * *
>
> > (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of

> dams, levees, channels, causeways, or flow diversion facilities.

In that provision, Congress expressly identified "changes" in the "movement" or "flow" of navigable waters or ground waters to be *nonpoint* sources of *pollution* that are not governed by the NPDES permit program and placed them on a short list for attention. See also Part I.B.2, *infra*. As a result, EPA issued guidance that addresses the very type of pollution at issue here—"increased pollution from the use of flood protected and drained land." EPA, THE CONTROL OF POLLUTION CAUSED BY HYDROGRAPHIC MODIFICATIONS 13 (1973).

Concern with the effects of dams and other water diversions is also embodied in EPA regulations, which expressly require existing dams and diversions to be operated to attain state water quality standards. 40 C.F.R. § 131.10(g)(4)(1992); see *PUD No. 1*, 511 U.S. at 719. It is clear that Congress intended flow diversions be managed through state water quality standards and local planning programs, not NPDES effluent limitations—the practice for the past 30 years.[4]

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[4] *United States* v. *M.C.C. of Fla.*, 772 F.2d 1501 (11th Cir. 1985), vacated, 481 U.S. 1034 (1987), and *Dubois* v. *United States Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 2001), on which the Eleventh Circuit relied, do not contradict this conclusion. Both involved uses of the navigable waters that went far beyond changing the movement, circulation or flow of water. In *M.C.C.*, a boat's propellers were used to rip up sediment and dispose of the dredged spoil in navigable waters. 772 F.2d at 1505-1506. In *Dubois*, navigable waters were taken for use in snowmaking equipment, then discharged as wastewater when the process was complete. 102 F.2d at 1296-1297. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001), on which the court below also relied, is wrong for the same reasons that the Eleventh Circuit's decision is erroneous.

5. The CWA contains detailed provisions describing categories of facilities that need permits, what levels of treatment are required for each category, and what EPA must do concerning each. 33 U.S.C. § 1311(b)-(m) (effluent limitations for different categories of point sources); § 1314(b), (d) (level of treatment required for industrial and municipal point sources); § 1316(b) (categories of point sources required to meet new source performance standards). Nothing in those statutory provisions addresses a state agency's diversion of water for flood control, water supply, environmental protection, and other public purposes.

6. EPA, the federal agency responsible for administering Section 402, has never treated flow diversion facilities like the S-9 pump as requiring NPDES permits. As this Court has recognized, the CWA required EPA "to publish regulations providing guidance for effluent limitations on existing point sources." *E.I. Du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116 (1977). When EPA promulgated those regulations, at 40 CFR Parts 400-471, *none* even remotely applied to a state water diversion facility like the S-9 pumps.

In fact, for over 30 years, EPA has consistently shared Petitioner's understanding of what constitutes an "addition" "from" a "point source," never suggesting that mere water diversion facilities require NPDES permits whenever they transfer water with a different chemical makeup than the receiving water. In *Gorsuch*, for example, the D.C. Circuit observed that "[i]n [EPA's] view, the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water * * * to another." 693 F.2d at 175; EPA *Gorsuch* Br. 23-24 (conceding "EPA's lack of authority under the NPDES program to control pollutants occurring naturally in the waterway or previously added by other sources"). And in *Consumers Power*, the Sixth Circuit noted EPA's view that "there can be no addition unless a source

physically introduces a pollutant into water from the outside world." 862 F.2d at 584; see also Pet. App. 43a-48a (Florida DEP's views). The courts in *Gorsuch* and *Consumers Power* adopted EPA's position, and Congress has never amended the statute to disavow that interpretation of the Act. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599-601 (1983); *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979) (congressional inaction or silence may support an inference that Congress approves an agency interpretation).

B. Legislative History Confirms That The NPDES Program Is Limited To Sources Of Pollutants And Does Not Address Pollution Caused By Water Diversions.

1. Legislative history confirms that Congress intended the NPDES program to regulate "sources" from which pollutants originate, not water control structures used to change the flow of and otherwise control waters. Earlier legislation prohibited only industrial discharges of "refuse" that interfered with navigation. Rivers and Harbors Appropriation Act of 1899 § 13 ("Refuse Act"), 33 U.S.C. § 407. In developing Section 402, Congress "extracted from the Refuse Act the basic formula and added municipal discharges to it, so that before any material can be added to the navigable waters authorization must first be granted * * * under Section 402." S. Rep. No. 92-414 at 76 (1971), reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972, Ser. No. 93-1, at 1415, 1494 ("1972 LEG. HIST."). In expanding the range of polluting materials subject to control, Congress's target remained the *originator* of those materials, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled *at the source*." *Id.* at 77, 1972 LEG. HIST. at 1495 (emphasis added). See also *id.* at 73, 1972 LEG. HIST. at 1491 (Congress "concentrate[d] on the control of pollutants *placed in* surface waters") (emphasis added); *id.* at 70, 1972 LEG. HIST. at 1488 (Section 402 seeks "to control,

on a source by source basis, the discharge of pollutants into the navigable waters").

2. Legislative history also confirms Congress's intention to leave the regulation of nonpoint source pollution generally to state land and water use planning programs:

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process * * * judging that those matters were appropriately left to the level of government closest to the sources of the problem.

S. Rep. No. 95-370 at 8-9 (1977), reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, Ser. No. 95-14 ("1977 LEG. HIST."). As reflected in the comments of Senator Muskie, the primary sponsor of the legislation in the Senate, programs developed to deal with nonpoint sources "would involve land use and other controls of that kind." Senate Debate on S. 2770, 1972, 1972 LEG. HIST. at 1314.

Most telling, in describing its direction to EPA to issue information on processes, procedures, and methods to control pollution caused by flow diversion facilities under § 304(f)(2)(F), Congress expressly identified "natural and man-made changes in the normal flow of surface and ground waters" as "nonpoint source" activities that are subject to state nonpoint source programs rather than the NPDES program. H.R. Rep. No. 92-911 at 109 (1971), 1972 LEG. HIST. at 796.[5]

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[5] Section 304(e) [later (f)] addresses the problem of nonpoint sources of pollution. This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. If our water pollution problems are truly to be solved, we are going to have to

C. Ordinary Principles Of Statutory Interpretation Establish That The NPDES Program Does Not Apply To Water Diversion Facilities.

Even if the text and history of the CWA did not so clearly contradict the Eleventh Circuit's decision, three rules of statutory interpretation resolve any doubt on the matter, establishing that the NPDES program does not extend to the movement of water by facilities from which no pollutants originate.

1. A Plain Statement From Congress Is Required To Displace Traditional State Jurisdiction Over State Water Management And Is Lacking Here.

A fundamental rule of statutory construction is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see also *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States * * * unless that was the clear and manifest purpose of Congress"); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

This Court has applied the "clear statement rule" to determine the meaning of provisions of the Clean Water Act. *SWANCC*, 531 U.S. at 173. In fact, the Court has a "particular duty to ensure that the federal-state balance is not

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> vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as * * * natural and manmade changes in the normal flow of surface and groundwaters.
>
> 1972 LEG. HIST. at 796.

destroyed" with respect to "traditional concern[s] of the States" such as water management and allocation. *United States* v. *Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring). That duty is heightened in the case of the CWA because Congress made explicit its "policy * * * to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b).[6] Congress further directed that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. CWA § 101(g), 33 U.S.C. § 1251(g).

Far from making a "clear statement" explicitly stripping the States of their traditional powers over water management and land use planning, the CWA recognized that the state and federal governments have distinct roles to play. *PUD No. 1*, 511 U.S. at 704. While federal agencies are responsible for the permit programs under Sections 402 and 404, the States are responsible for establishing water quality standards. CWA § 303, 33 U.S.C. § 1313. States seek to achieve those standards by establishing Total Maximum Daily Load allowances ("TMDLs") for waters for which point source effluent limitations have proved insufficient, and by "develop[ing] and implement[ing]" programs to manage nonpoint sources of water pollution "on a watershed-by-watershed basis." CWA §§ 303(d), 319(a)-(c), 33 U.S.C.

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[6] The States' traditional interest in water management is at its peak where the control of pollution in urban and agricultural basins—as in this case—implicates both water and land use planning. See EPA, THE CONTROL OF POLLUTION CAUSED BY HYDROGRAPHIC MODIFICATIONS 144 (1973) (describing land use regulation as a control for urban runoff). This court has long recognized States have traditional and primary power over both land and water use. See *SWANCC*, 531 U.S. at 174 (citing authority).

§§ 1313(d), 1329(a)-(c); see *Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002). In pursuing those goals, States engage in a watershed-specific "continuing planning process" that responds to the features of the watershed and other local conditions. CWA § 303(e), 33 U.S.C. § 1313(e); see also CWA § 208, 33 U.S.C. § 1288. See generally THE CLEAN WATER ACT HANDBOOK, *supra*, at 191-220.[7]

Congress contemplated that the very mechanisms—dams, levees, channels, causeways, and flow diversion facilities—by which the States manage and allocate their waters would be addressed, insofar as they cause pollution, by the States as nonpoint sources of pollution under these programs. See Part I.A.4, *supra*; CWA § 304(f)(2)(F).

Florida has been a leader in water resource management since passage of the Florida Water Resources Act of 1972. Fla. Stat. ch. 373. It has adopted stringent general water pollution laws (Fla. Stat. ch. 403), as well as ambitious specialized laws targeting specific watersheds. See, *e.g.*, Fla. Stat. § 373.4592 (Everglades Forever Act), § 373.4593 (Florida Bay Restoration), § 373.4595 (Lake Okeechobee Protection Program). Florida's Everglades Forever Act established the world's largest environmental restoration and protection effort aimed specifically at developing, implementing, and financing protections from urban and agricultural development in lands drained or otherwise

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[7] Virtually every state has developed general discharge prohibitions. Environmental Law Institute, ENFORCEABLE STATE MECHANISMS FOR THE CONTROL OF NONPOINT SOURCE WATER POLLUTION (1997). "[U]nlike the federal act many of these can be applied to nonpoint source pollution because they lack the limitation in 33 U.S.C. § 1362(12) which defines 'discharge of a pollutant' as 'from any point source.'" *Id.* at 9. State programs reveal a great variety of approaches reflecting varying economic activities and particular goals for the watersheds for which they must plan water and land uses. See *id.* at 55.

affected by the C&SF Project. The Everglades program produced the comprehensive CONCEPTUAL PLAN and other programs which deal with the pollution problems caused by the S-9 and its related structures on a watershed wide basis. Statement Parts E, F, *supra*.

These efforts are now in jeopardy of being trumped, their implementation at least seriously delayed, by a federal NPDES permitting process. The Eleventh Circuit's expansion of the scope of the NPDES permit program to water diversions that originate no pollutants tramples on the States' own efforts to deal with water allocation, use, and pollution using state powers that Congress explicitly meant to "preserve and protect," including powers specifically recognized in CWA Sections 208, 303(d), and 319. Interjection of a federal permitting requirement into States' water and land use planning processes—Florida's in particular—would be unnecessarily burdensome to regional multi-agency planning and an affront to the powers that States have long exercised in this area.

Nothing in Section 402 evinces the slightest intent to extend NPDES beyond its traditional industrial and municipal targets to reach state water diversions, for which Section 304(f) contemplates nonpoint source treatment. Absent a clear statement from Congress, the CWA cannot properly be interpreted to impose a burdensome federal permitting scheme on the operation of the C&SF Project and the current carefully laid plans to preserve the Everglades for future generations through major changes to the existing water management regime.

2. The Application Of NPDES To Water Diversion Facilities Would Lead To Absurd And Disastrous Results That Would Thwart Congress's Purposes.

The Eleventh Circuit's interpretation of Section 402 should also be rejected because it leads to absurd, wholly impracticable results that would undermine the entire regime

of nonpoint source regulation. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

1. The court of appeals' declaration that a "receiving body of water is the relevant body of navigable water" is revolutionary. Pet. App. 6a. Watersheds are divided and often re-divided into basins for ever-changing water management needs. J.A. 108-109. Flow diversion facilities are constantly moving water to and from areas "it would not have otherwise flowed." Since all waters no matter how clean contain pollutants,[8] every inter-basin transfer becomes—under the Eleventh Circuit's analysis—a "discharge of pollutants" to the receiving water subject to the NPDES permit process, regardless whether the basin was separated by man or naturally and whether the receiving waters are cleaner or dirtier than those conveyed. Since NPDES prohibits the addition of "*any*" pollutant, not only those that exceed water quality standards, the transfer of *any* water becomes a discharge under the Eleventh Circuit's interpretation. A "movement" becomes an "addition" and "navigable waters" become "pollutants." The "navigable waters" are treated on par with industrial and municipal waste. Every federal, state, regional, and local agency charged with managing a State's waters is subjected to NPDES every time it determines the public interest is served by moving them, necessitating

[8] Every body of water contains distinct constituents. See Brian J. Skinner & Stephen C. Porter, PHYSICAL GEOLOGY 283-285 (1987). The D.C. Circuit in *Gorsuch* explained, for example, that the very act of damming a river changes the constituents of the water above the dam, so that water going over the dam has different pollutants than the receiving water. See 693 F.2d at 161-164 (discussing "a variety of interrelated water quality problems, both in the reservoirs and in the river water downstream from a dam," caused by dams, and concluding that "[d]ams affect environmental quality in a large number of ways, both good and bad").

hundreds of thousands of additional NPDES permits across the country.

2. By ignoring the line Congress drew between point and nonpoint sources, the court of appeals has pitted NPDES—the program designed to eliminate the flow of pollutants into the Nations waters—*against* CWA-approved state planning processes established to ensure that both water quantity and quality needs are met through comprehensive watershed planning and control systems. NPDES targets wastewater outflows by imposing maximum "effluent limitations." *EPA*, 426 U.S. at 204; 33 U.S.C. § 1311(b), (c). Those technology-based effluent limitations require compliance without consideration of local water resource planning and wildlife management goals. It is well recognized that water control structures allow urban and agricultural uses on the lands they reclaim and that those uses affect water quality. EPA, THE CONTROL OF POLLUTION CAUSED BY HYDROGRAPHIC MODIFICATIONS (1973). If the decision below stands, the planned solution to those problems—traditionally state regulatory strategies, best management practices, land use planning, urban waste management, public education, and ground water controls—will be replaced with technology-based effluent limitations that give no consideration to quantity requirements not only of urban and agricultural areas, but of the environment itself.

Unlike industrial or municipal wastewater outflows, which are continuous and of known quality, discharges from water control structures are highly variable in timing and constituents. The SFWMD's pump stations, levees, canals, and impoundments are major components of the State's overall water management, providing water supply, protection from salt water intrusion, flood control, and environmental protection. Use of these water control structures are very site specific, varying with local circumstances, seasonal and meteorological conditions, Florida's infamous cycles of rain and drought, and water

supply needs. Only through nonpoint source programs does the State have the flexibility to maintain the benefits of the C&SF Project in balance with its detrimental effects on water quality. Trying to apply NPDES point source permits is unsound scientifically and economically. NPDES is simply not designed to handle these complexities for which areawide water quality plans are the better regulatory tool. *Gorsuch*, 693 F.2d at 182. That is why Congress recognized in CWA Section 304(f)(2)(F) that nonpoint source programs provide far more appropriate mechanisms to oversee state water management facilities.

3. The Comprehensive Everglades Restoration Project would be undermined if elements of the project were subject to NPDES permitting rather than, as Congress envisioned, addressed as part of the overall plan to restore natural flows and advance other beneficial purposes for which the movement of water is imperative. In CERP, Congress adopted an $8 billion plan to modify the C&SF Project to restore the South Florida Ecosystem. CERP is a cornerstone of the State's Everglades restoration and water quality strategy. A recommended Comprehensive Integrated Water Quality Plan links water quality and hydrologic restoration for the entire ecosystem. RESTUDY 9-53. Together, the federal and State agencies are working to redirect flows, to conserve and store water otherwise wasted to tide, and to manage water quantity for the benefit of the whole ecosystem. New reservoirs, impoundments, and controls are being constructed with old canals, levees, and structures being removed or moved. Changing the movement of water throughout the C&SF system is critical to the survival of the Everglades and the success of CERP.

The CERP project has undergone unprecedented oversight and review. Congress will determine as CERP is implemented exactly how the problems of the Everglades water quality will be resolved and how costs will be apportioned. At no point did Congress or the agencies

consider the application of the NPDES and its effluent-based standards an appropriate method of achieving those goals. In fact, CERP and State planners specifically addressed the S-9 pump station and have recommended alternative remedies aimed at redirecting flows to other areas for multiple purposes that NPDES will not accommodate. Statement, *supra*, Part F. The application of NPDES at each structure would conflict with many of CERP's goals of environmental improvement by restricting water flows—the very purpose of NPDES—or imposing technological treatment requirements that are different from the planned consensus solution and that would dramatically increase restoration costs and time. NPDES would only adds a lengthy and burdensome permitting process for every structure, which would in turn result in additional time- and resource-consuming litigation by those dissatisfied with CERP.

And CERP is but an example of the disruption that would be caused by the Eleventh Circuit's rule in Florida and across the Nation. "The core nonpoint water pollution control programs under the [CWA] have been augmented by provisions of the [Coastal Zone Act Reauthorization Amendment], continuing development of TMDL's, enforcable state mechanisms, traditional land use planning, and innovative new solutions such as water quality-based trading." THE CLEAN WATER ACT HANDBOOK, *supra*, at 204. EPA acknowledges with respect to nonpoint source pollution that "[f]inding solutions to these complex water quality problems requires [such] innovative strategies." EPA Office of Water, PROPOSED WATER QUALITY TRADING POLICY Part I (2002).

Florida has responded with regulatory programs of remarkable scope in its Everglades Forever Act (Fla. Stat. § 373.4592), the joint federal-state Comprehensive Everglades Restoration Plan (the RESTUDY), Florida's Water Resources Act (Fla. Stat. ch. 373), and Florida's Pollution Control Act. Fla. Stat. ch. 403. Water quality standards have been developed for all water bodies within the state. Fla.

Admin. Code ch. 62-302. Water quality management plans have been drawn on a watershed-by-watershed basis under CWA Section 319(b)(4). Florida is actively developing TMDL programs to further account for point source and nonpoint source flows on a systemic level. Fla. Stat. § 403.067(1). Elements of Florida's Section 208 area-wide plans are incorporated into the State's overall continuing planning process. CWA § 303(e)(3)(B), 33 U.S.C. § 1313(e)(3)(B). The State's plans under Sections 208 and 303(e) will ultimately be incorporated into an overall Water Quality Management Plan under regulations promulgated by EPA. 40 C.F.R. pt. 30 (2001).

This entire panoply of nonpoint source mechanisms and planning strategies is now threatened with the imposition of effluent limitations on a structure-by-structure basis. For over 30 years the federal and state governments together have toiled to develop and improve complex strategies to deal with one of the most important and challenging issues facing the States. It is unfathomable that, by federal judicial decree, NPDES processes, procedures, and standards should now all of the sudden be substituted. "The control of non-point source pollution is a study in classic federalism. * * * As each state strives to achieve control over [nonpoint] sources, 50 potential programs are in the process of development, experimentation, and implementation. Eventually, efficient and successful programs will arise out of the experimentation and an overall control strategy may be developed." THE CLEAN WATER ACT HANDBOOK, *supra*, at 202. That will not occur if state efforts are trumped by the NPDES program.

4. The Eleventh Circuit's view that to fall under Section 402 "the point source does not necessarily have to be source or origin of pollutants" improperly shifts responsibility away from the original sources of pollutants to those that must manage the waters for the public good. See *Appalachian Power*, 545 F.2d at 1377 (it is beyond EPA's authority to require treatment of pre-existing pollutants not added from

the facility through which they pass). If the NPDES permit program applies, SFWMD will be responsible, under threat of civil penalty or criminal sanction, to treat the collective discharges from all point and nonpoint within each basin from which it moves water. Pet. App. 14a; 33 U.S.C. § 1319. The decision below thus makes the District legally responsible for pollutants added by thousands of urban, industrial, and agricultural activities.[9] That shift of responsibility and burdens away from the sources at which pollutants originate contradicts Congress' focus upon regulating pollution at its *source*.

What makes this result even more absurd is that under the Eleventh Circuit's rule the District has been violating the CWA for decades by operating water control devices without NPDES permits. If the court of appeals decision stands, the SFWMD could find itself in the same situation as New York City, which was recently fined $5.7 million (out of a maximum possible civil penalty of $63 million) for operating a water supply system through which it had transferred water for 70 years and upon which the City of New York greatly depends. *Catskill Mountains* v. *New* York, 244 F. Supp. 2d 41, 46 & 57 (N.D. NY 2003). And the District will have to

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[9] According to the Eleventh Circuit, the District could escape the need to apply for an NPDES permit for diverting water containing pollutants previously introduced by others if it could show that each source was either itself permitted or was exempt from permitting (for example, as return flows from agricultural irrigation). *Fishermen* v. *Closter Farms*, 300 F.3d 1294, 1297 (11th Cir. 2002). To state this approach it to recognized its utter absurdity. Such an intensive factual and legal inquiry into the source and permitting or exempt status of every pollutant in the transferred water would be an incredibly burdensome, wasteful, and likely impossible task that would consume vast resources. Congress nowhere so much as hinted that the need for an NPDES permit turned on so impractical an inquiry being repeated, over and over again, for every flow diversion facility.

deal with efforts to impose liabilities for inevitable future violations as well. Events from accidents to hurricanes to droughts radically affect water quality within the C-11 basin. The SFWMD simply cannot control everything that gets into its waters and, therefore, whether water quality standards can always be maintained.

5. The Eleventh Circuit decision replaces the clear line drawn by Congress between point sources of pollutants and nonpoint sources of pollution—a line that has governed water management for 30 years—with a test that will require factually intensive inquiries into whether the waters are "distinct" and whether they would or would not reach each other "but for" the point source. Such a test is fraught with untenable practical complications and implications.

The Eleventh Circuit's test begs the question as to what constitutes a "distinct" water body into which the movement of water will now require a permit. Under the court of appeals' analysis, it was apparently irrelevant that the waters in the C-11 Canal and WCA-3 are all part of the same natural system, separated only by a manmade levee. Instead, whether the waters are "distinct" turns upon whether they would presently flow together, or whether the diversion facility followed or changed the natural flow of the water. Pet. App. 7a. But all water control facilities—dams, levees, channels, causeways, and flow diversion facilities—by their very nature change natural flow. Levees are built to divide and separate waters. Scarcely any public water management system would escape NPDES regulation under the Eleventh Circuit's rule.

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Given the host of serious practical problems that follow from the Eleventh Circuit's approach, one is "struck by what Congress did not say." *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971). "Congress would certainly recognize" the practical impact of extending NPDES permitting to virtually

every diversion of water throughout the Nation, including its "alter[ation of] sensitive federal-state relationships." *Id.* at 812. "[T]he fact that [this impact is] not" expressly addressed in the statute or "even discussed in the legislative history * * * strongly suggests that Congress did not intend" to reach so far. *Ibid.*

3. The CWA's Severe Criminal Penalties Require That It Be Narrowly Construed.

The CWA is enforceable through criminal as well as civil penalties. Pet. App. 14a. Violations carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under the Eleventh Circuit's interpretation, anyone managing navigable waters so as to change their natural flow and divert water into another "distinct" water body commits a criminal offense.

Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like Section 402, that have both criminal and civil consequences. See *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] * * * not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation"); *id.* at 519 (Scalia and Thomas, JJ., concurring). Because the Eleventh Circuit's conclusion that pollutants do not have to originate from the point source is hardly an "unambiguously correct" interpretation of the CWA (*United States* v. *Granderson*, 511 U.S. 39, 54 (1994)), and because that expansive interpretation exposes Petitioner and countless other public water

managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected.

II. A STATE'S DIVERSION OF WATER FROM ONE TO ANOTHER PART OF A SINGLE NAVIGABLE WATER LIKE THE EVERGLADES ECOSYSTEM INVOLVES NO "ADDITION" AND THUS FALLS OUTSIDE THE NPDES SCHEME.

The Eleventh Circuit's decision may also be reversed for another, independent reason. The court of appeals erred in concluding that the S-9 pump moves water between "distinct" water bodies. Pet. App. 7a. The undisputed record and a long history of statutory and regulatory enactments shows beyond question that the water on either side of the S-9 pump is part of a single body of navigable water, so that moving water from one side to the other cannot involve any "addition" of pollutants covered by Section 402.

The Eleventh Circuit properly recognized that moving water around *within* a water body cannot result in an "addition." Pet. App. 6a. As the Court in *Catskill* explained,

> [t]he *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition," assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot * * *. In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

273 F.3d at 492. Nothing about moving water around within the same water body "increases" or "augments" the pollution pre-existing within the water system. WEBSTER'S THIRD; see *supra*, Part I.A.2.

The Eleventh Circuit acknowledged that the C-11 Basin from which the S-9 draws water and the WCA-3 into which it

moves that water were part of the historical Everglades. Pet. App. 8a n.8. But the court's supposition that the C&SF Project levees, impoundments, canals, and pumps destroyed that single ecosystem by creating separate and distinct navigable waters is simply wrong. The waters on either side of the S-9 remain part of a single Everglades water system.

The undisputed unitary nature of these waters is well established by the consistent understanding of the scientific community and the consistent treatment of the waters as part of a single system by State and federal regulators and legislatures. The levees, pump station, canal, and impoundment at issue here are part of a larger, interlocking system to control the waters of the South Florida ecosystem, including the Everglades. See *supra*, Statement Part C. Surface and ground waters (which respondents' own water experts described as virtually indistinguishable) naturally flow together from the Butler Chain of Lakes near Orlando south to the Florida Bay. J.A. 117, 170 ¶ 7. The basins, which the Eleventh Circuit declared "distinct," are but "artificial" and changeable lines drawn for water management purposes. See J.A. 68, 96-97. Not only are the basin lines dynamic, so are the flow regimes used to determine the interaction of waters between them. See *supra*, Statement Part C. The levees, S-9 pump and other structures merely control the rate and movement of water within the system. J.A. 171 ¶¶ 11-13.

The C&SF system is designed to maintain the close relationship between its integrated parts. For example, it continually returns seepage from the WCA-3 back to the WCA-3 for water supply, flood protection, and the prevention of salt water intrusion. J.A. 37, 172 ¶ 14. It sends to the WCA-3 flood waters that, but for the levees, would naturally have supplied the Everglades with water. And it maintains WCA-3 water at levels necessary to prevent salt water intrusion into the aquifer at the coast, reflecting the fact that the groundwater is undivided by any levee or other structure. The cycling of these waters is critical not only for

urban and agricultural areas, but for health of the entire Everglades system. See J.A. 65-66.

The Florida and federal legislatures recognized the integrated nature of the water system when they directed the development of the Comprehensive Everglades Restoration Plan, which treats all of the basins within the C&SF Project as critical to the South Florida Ecosystem. WRDA 1996 § 528(b)(1)(A)(i) (comprehensive plan to "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades"); WRDA 2000, P.L. 106-541 § 601(a)(5) & (h)(1) ("The overarching objective of [CERP] is the restoration, preservation, and protection of the South Florida Ecosystem," broadly defined to include the Everglades and contiguous near-shore coastal water of South Florida). The Florida legislature similarly recognizes the need for restoration of the "Everglades ecosystem" to be comprehensive. Fla. Stat. § 373.4592(d).

In response to this Court's call for the views of the Solicitor General, the United States pointed out (at 13-14) the Eleventh Circuit's error:

> In the United States' view, the lower courts' characterization of the water control facilities, which presents a mixed question of law and fact, may well be incorrect. The C-11 Canal and WCA-3A can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water. The characterization is appropriate because the C-11 Basin, the C-11 Canal, and WCA-3A share a unique, intimately related, hydrological association. Furthermore, those components were created and are managed pursuant to legislative direction—by both the United States and the State of Florida—as a part of a single integrated resource.

Because the record on this question is clear and uncontested, and because the natural system, as well as the

regulatory and legislative treatment of the entire area of the C-11 Basin and WCA-3, establishes as a matter of law that it is a unitary water and ecosystem, this Court may reverse on this ground without the need for remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

A. Pertinent Provisions of the Clean Water Act

Section 101, 33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) **Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.** The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.] –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

* * *

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

* * *

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) **Congressional recognition, preservation, and protection of primary responsibilities and rights of States.** It is the policy of the Congress to recognize,

preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, ... It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(g) **Authority of States over water.** It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Section 208, 33 U.S.C. § 1288. Areawide waste treatment management

(a) **Identification and designation of areas having substantial water quality control problems.** For the purpose of encouraging and facilitating the development and implementation of areawide waste treatment management plans –

* * *

(2) The Governor of each State, ... shall identify each area within the State which, as a result of urban-industrial concentrations or other factors, has substantial water quality control problems.... the Governor shall designate (A) the boundaries of each such area and (B) a single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans for such area.

* * *

(b) **Planning process.** (1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 201 of this Act [33 USCS § 1281]. Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved. The initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

* * *

(2) Any plan prepared under such process shall include, but not be limited to –

(A) the identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period, annually updated (including an analysis of alternative

waste treatment systems), including any requirements for the acquisition of land for treatment purposes; the necessary waste water collection and urban storm water runoff systems; and a program to provide the necessary financial arrangements for the development of such treatment works, and an identification of open space and recreation opportunities that can be expected to result from improved water quality, including consideration of potential use of lands associated with treatment works and increased access to water-based recreation;

(B) the establishment of construction priorities for such treatment works and time schedules for the initiation and completion of all treatment works;

(C) the establishment of a regulatory program to –

(i) implement the waste treatment management requirements of section 201(c) [33 USCS § 1281(c)],

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial waste discharge into any treatment works in such area meet applicable pretreatment requirements;

(D) the identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan;

(E) the identification of the measures necessary to carry out the plan (including financing), the period of time necessary to carry out the plan, the costs of carrying out the plan within such time, and the economic, social and

environmental impact of carrying out the plan within such time;

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(G) a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine runoff, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(H) a process to (i) identify construction activity related sources of pollution, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(I) a process to (i) identify, if appropriate, salt water intrusion into rivers, lakes, and estuaries resulting from reduction of fresh water flow from any cause, including irrigation, obstruction, ground water extraction, and diversion, and (ii) set forth procedures and methods to control such intrusion to the extent feasible where such procedures and methods are otherwise a part of the waste treatment management plan;

(J) a process to control the disposition of all residual waste generated in such area which could affect water quality; and

(K) a process to control the disposal of pollutants on land or in subsurface excavation within such area to protect ground and surface water quality.

* * *

Section 301, 33 U.S.C. § 1311. Effluent limitations

(a) **Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) **Timetable for achievement of objectives.** In order to carry out the objectives of this Act there shall be achieved –

(1)(A) ... effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS §1314(b)], ...

* * *

(2)(A) for pollutants identified ... effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined

in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2) ...

* * *

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

* * *

Section 302, 33 U.S.C. § 1312. Water quality related effluent limitations

(a) **Establishment.** Whenever, in the judgment of the Administrator or as identified under section 304(1) [33 USCS § 1314(1)], discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act [33 USCS § 1311(b)(2)], would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure

protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

* * *

Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

* * *

(c) **Review; revised standards; publication.** (1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33

USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

* * *

(d) **Identification of areas with insufficient controls; maximum daily loads; certain effluvient limitations revision.** (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B), [33 USCS § 1311 (b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

* * *

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculations. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonable variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

* * *

(e) **Continuing planning process.** (1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.]

* * *

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section:

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

* * *

Section 304, 33 U.S.C. § 1314. Information and guidelines

* * *

(f) **Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.** The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 208 of this Act [33 USCS § 1288], within one year after the effective date of this subsection [effective Oct. 18, 1972] (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from –

* * *

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

* * *

Section 319, 33 U.S.C. § 1329. Nonpoint source management programs

(a) **State assessment reports.** (1) Contents. The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which –

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this Act [33 USCS §§ 1251 et seq.];

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which had significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under

subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsection (h) and (i).

* * *

(b) **State management programs.** (1) In general. The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents. Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for

enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

* * *

Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) **Permits for discharge of pollutants.** (1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

* * *

Section 502, 33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

* * *

B. Pertinent Provisions of Water Resources Development Act of 1996; P.L. 104-303

SEC. 528. EVERGLADES AND SOUTH FLORIDA ECOSYSTEM RESTORATION.

(a) DEFINITIONS. – In this section, the following definitions apply:

* * *

(4) SOUTH FLORIDA ECOSYSTEM. – The term "South Florida ecosystem" means the area consisting of the lands and waters within the boundary of the South Florida Water Management District, including the Everglades, the Florida Keys, and the contiguous near-shore coastal waters of South Florida.

* * *

(b) RESTORATION ACTIVITIES. –

(1) COMPREHENSIVE PLAN. –

(A) DEVELOPMENT. –

(i) PURPOSE. – The Secretary shall develop, as expeditiously as practicable, a proposed comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem. The comprehensive plan shall provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades. The comprehensive plan shall include such features as are necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project.

* * *

(4) GENERAL PROVISIONS. –

(A) WATER QUALITY. – In carrying out activities described in this subsection and sections 315 and 316, the Secretary –

(i) shall take into account the protection of water quality by considering applicable State water quality standards; and

(ii) may include in projects such features as are necessary to provide water to restore, preserve, and protect the South Florida ecosystem.

* * *

(c) INTEGRATION OF OTHER ACTIVITIES. –

(1) IN GENERAL. – In carrying out activities described in subsection (b), the Secretary shall integrate such activities with ongoing Federal and State projects and activities, including –

(A) the project for the ecosystem restoration of the Kissimmee River, Florida . . .

(B) the project for modifications to improve water deliveries into Everglades National Park authorized by section 104 of the Everglades National Park Protection and Expansion Act of 1989 (16 U.S.C. 410r-8);

(C) activities under the Florida Keys National Marine Sanctuary and Protection Act (16 U.S.C. 1433 note; 104 Stat. 3089); and

(D) the Everglades Construction Project of the State of Florida.

* * *

C. Pertinent Provisions of Water Resources Development Act of 2000; P.L. 106-541

SEC. 601. COMPREHENSIVE EVERGLADES RESTORATION PLAN.

(a) DEFINITIONS. – In this section, the following definitions apply:

* * *

(5) SOUTH FLORIDA ECOSYSTEM. –

(A) IN GENERAL. – The term "South Florida ecosystem" means the area consisting of the land and water within the boundary of the South Florida Water Management District in effect on July 1, 1999.

(B) INCLUSIONS. – The term "South Florida ecosystem" includes –

(i) the Everglades;

(ii) the Florida Keys; and

(iii) the contiguous near-shore coastal water of South Florida.

* * *

(b) COMPREHENSIVE EVERGLADES RESTORATION PLAN. –

(1) APPROVAL. –

(A) IN GENERAL – Except as modified by this section, the Plan is approved as a framework for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. The Plan shall be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan, and required pursuant to this section, for as long as the project is authorized.

* * *

(h) ASSURANCE OF PROJECT BENEFITS. –

(1) IN GENERAL. – The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection.

* * *